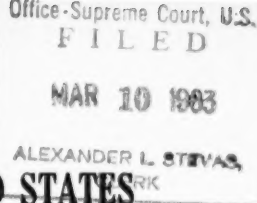


82-1515

IN THE
SUPREME COURT OF THE UNITED STATES



October Term 1982

DELAWARE RIVER BASIN COMMISSION, ET AL.,
Respondent

v.

BUCKS COUNTY WATER AND SEWER AUTHORITY,
Petitioner

**ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT
COURT OF APPEALS
FOR THE THIRD CIRCUIT
(THIRD CIRCUIT COURT NO. 82-1233)**

**PETITION OF BUCKS COUNTY WATER
AND SEWER AUTHORITY FOR
WRIT OF CERTIORARI**

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I. STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW:

- A. SHOULD CERTIORARI BE GRANTED TO REVIEW THE CIRCUIT COURT'S JUDGMENT ORDER SINCE THE CONSTITUTIONALITY OF THE COMPACT AND REGULATIONS PROVIDING FOR INTERSTATE AND FEDERAL MANAGEMENT OF THE DELAWARE RIVER BASIN ARE SIGNIFICANT AND VITAL TO THE WATER RESOURCES OF THE REGION?
- B. SHOULD CERTIORARI BE GRANTED TO REVIEW THE CIRCUIT COURT'S JUDGMENT ORDER, UPHOLDING THE CONSTITUTIONALITY OF THE PRESENT RATE STRUCTURE, BECAUSE THE RESULTING CLASSIFICATION LACKS A RATIONAL BASIS, THEREBY CONFLICTING WITH APPLICABLE DECISIONS OF THIS COURT?

II. LIST OF PARTIES TO PROCEEDING BEFORE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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III. TABLE OF CONTENTS

	Page
I. QUESTIONS PRESENTED FOR REVIEW	i
II. LIST OF PARTIES TO THE PROCEEDING BEFORE THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT	ii
III. TABLE OF CONTENTS	iv
IV. TABLE OF CITATIONS AND AUTHORITIES	v
V. REPORTS OF OPINIONS DELIVERED IN COURTS BELOW	vii
VI. STATEMENT OF JURISDICTION ...	viii
VII. CONSTITUTIONAL PROVISIONS, COMPACTS, STATUTES, AND REGULATIONS INVOLVED	ix
VIII. STATEMENT OF THE CASE	1
IX. ARGUMENT	5
X. APPENDIX	Separate Booklet

IV. TABLE OF CITATIONS AND AUTHORITIES

A. Cases

<i>Baldwin v. Fish and Commission of Montana</i> , 435 U.S. 371, 98 S. Ct. 1852, 56 L. Ed. 2d 354 (1978)	9
<i>Borough of Morrisville v. Delaware River Basin Commission</i> , 399 F. Supp. 469 (1975)	8
<i>Delaware River Basin Commission v. Bucks County Water and Sewer Authority</i> , 641 F. 2d 1087 (3rd Cir. 1981)	3, 5
<i>Lau Ow Bew v. United States</i> , 144 U.S. 47, 12 S. Ct. 517, 36 L. Ed. 340 (1892)	6
<i>Magnum Import Co. v. Coty</i> , 262 U.S. 159, 43 S. Ct. 531, 67 L. Ed. 922 (1923)	6
<i>Mathews v. Lucas</i> , 427 U.S. 495, 96 S. Ct. 2760, 49 L. Ed. 2d 651 (1976)	7
<i>McGinnis v. Royster</i> , 410 U.S. 263, 93 S. Ct. 1055, 35 L. Ed. 2nd 282 (1973)	7
<i>Memorial Hospital v. Maricopa County</i> , 415 U.S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974)	9
<i>Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware</i> , 414 U.S. 117, 94 S. Ct. 383, 38 L. Ed. 2d 348 (1973)	6
<i>New Jersey v. New York</i> , 283 U.S. 336, 51 S. Ct. 478, 75 L. Ed. 1104 (1931)	5
<i>New Jersey v. New York</i> , 347 U.S. 995, 74 S. Ct. 842, 98 L. Ed. 1127 (1954)	1, 5
<i>New Orleans v. Duke</i> , 427 U.S. 297, 96 S. Ct. 2513, 49 L. Ed. 2d. 511 (1976)	11
<i>United States Railroad Retirement Board v. Fritz</i> , 449 U.S. 166, 101 S. Ct. 453, 66 L. Ed. 2d 268 (1980)	7, 10

B. CONSTITUTIONAL PROVISIONS

C. *Statutes*

United States Constitution Amendment V	ix
United States Constitution Amendment XIV §1 . .	ix
Act of June 25, 1948, c. 646, §1, 62 Stat. 928 (28 U.S.C. 1254)	viii
Act of June 25, 1948, c. 646, §1, 62 Stat. 928 (28 U.S.C. 1331)	3

V. REPORTS OF OPINIONS OF COURTS BELOW

- A. *Delaware River Basin Commission v. Bucks County Water and Sewer Authority*, 474 F. Supp. 1249 (E.D. Pa. 1979)
- B. *Delaware River Basin Commission v. Bucks County Water and Sewer Authority*, 641 F. 2d 1087 (3rd Cir. 1981)
- C. *Delaware River Basin Commission v. Bucks County Water and Sewer Authority*, 545 F. Supp. 138 (E.D. Pa. 1982)
- D. *Delaware River Basin Commission v. Bucks County Water and Sewer Authority*, No. 82-1233 (3rd Cir. 1983) Judgment Order

VI. STATEMENT OF SUPREME COURT JURISDICTION

- A. A Judgment Order against Bucks County Water and Sewer Authority was issued on January 6, 1983 by the United States Court of Appeals for the Third Circuit.
- B. Bucks County Water and Sewer Authority filed a Petition for Rehearing which was denied by Order on January 31, 1983. On February 10, 1983, the Court of Appeals issued a thirty (30) day Stay of Mandate pending filing of Petition for Writ of Certiorari.
- C. The United States is given jurisdiction to review this matter by the Act of June 25, 1948, c. 646, §1, 62 Stat. 928 (28 USCS 1254).

VII. CONSTITUTIONAL PROVISIONS, COMPACTS, STATUTES AND REGULATIONS INVOLVED

A. CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution Amendment XIV §1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any

B. COMPACT PROVISIONS

The following are provisions of the *Delaware River Basin Compact* which are of major significance to this case. The Compact is set forth in the Appendix in its entirety.

1.3 Purpose and Findings. The legislative bodies of the respective signatory parties hereby find and declare:

(a) The water resources of the basin are affected with a local, state, regional and national interest and their planning, conservation, utilization, development, management and control, under ap-

appropriate arrangements for intergovernmental cooperation, are public purposes of the respective signatory parties.

(b) The water resources of the basin are subject to the sovereign right and responsibility of the signatory parties, and it is the purpose of this compact to provide for a joint exercise of such powers of sovereignty in the common interests of the people of the region.

(c) The water resources of the basin are functionally interrelated, and the uses of these resources are interdependent. A single administrative agency is therefore essential for effective and economical direction, supervision and coordination of efforts and programs of federal, state and local governments and of private enterprise.

(d) The water resources of the Delaware River Basin, if properly planned and utilized, are ample to meet all presently projected demands, including existing and added diversions in future years and ever increasing economies and efficiencies in the use and reuse of water resources can be brought about by comprehensive planning, programming and management.

(e) In general, the purposes of this compact are to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the states; to encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of the basin; to provide for cooperative planning and action by the signatory parties with respect to such water resources; and to apply the principal of equal and uniform treatment to all water users who are similarly situated and to all users of related facilities, without regard to established political boundaries.

3.7 Rates and Charges. The commission may from time to time after public notice and hearing fix, alter and revise rates, rentals, charges and tolls and classifications thereof, for the use of facilities which it may own or operate and for products and services rendered thereby, without regulation or control by any department, office or agency of any signatory party.

15.1 Reservations. In the exercise of the powers reserved to the Congress, pursuant to Section 1.4 of the Compact, the consent to and participation in the Compact by the United States is subject to the following conditions and reservations:

(b) No provisions of Section 3.7 of the Compact shall be deemed to authorize the commission to impose any charge for water withdrawals or diversions which could lawfully have been made without charge on the effective date of the Compact; or to impose any charges with respect to commercial navigation within the Basin, jurisdiction over which is reserved to the Federal Government; *Provided*, That this paragraph shall be applicable to the extent not inconsistent with Section 1.4 of this Compact.

C. DELAWARE RIVER BASIN COMMISSION RESOLUTIONS

The following is the section of DRBC Resolution 74-6 which is of major significance to this case. The entire Resolution is set forth in the Appendix.

Resolution 74-6 §15-1.3

1. "Legal entitlement" means quantity of volume of water expressed in million gallons per month determined by the lesser of the following conditions:

(a) A valid and subsisting permit, issued under the Authority of one of the signatory parties, if such permit was required as of October 27, 1961, or thereafter;

(b) Physical capability as required for such taking;

(c) The total allocable flow without augmentation by the Commission using a seven day, ten year, low-flow criterion mesh at the point of withdrawal or diversion.

VIII. STATEMENT OF THE CASE

This Court has retained jurisdiction in a separate water case, pinpointing its realization that issues over the use of the Delaware will long remain. See *New Jersey v. New York*, 347 U.S. 995, 74 S. Ct. 842, 98 L. Ed. 1127 (1954).

Water from the Delaware River is shared for drinking purposes pursuant to this Court's opinion among Pennsylvania, New York, and New Jersey.

Anticipating the need for an even more reasoned sharing basis, in 1961, after years of discord and negotiation, these states, along with Delaware, enacted legislation, the Delaware River Basin Compact, to regulate and allocate the scarce resources of the Delaware River Basin. The United States of America ratified the Compact pursuant to Article I, Section 10, of the United States Constitution. The Compact stated (at § 1.3) its purpose to be the "planning, conservation, utilization, development, management and control of the water resources of the Basin".

The Compact established a Commission to manage the Basin, composed of member state governors and a representative of the President.

Prior to ratification, Congress added Section 15.1(b) which, along with original Section 3.7, is the root of the present controversy:

3.7 Rates and Charges. The commission may from time to time after public notice and hearing fix, alter and revise rates, rentals, charges and tolls and classifications thereof, for the use of facilities which it may own or operate and for products and services rendered thereby, without regulation or control by any department, office or agency of any signatory party.

15.1 Reservations. In the exercise of the powers reserved to the Congress, pursuant to Section 1.4 of the Compact, the consent to and participation in the Compact by the United States is subject to the following conditions and reservations:

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Section 15.1(b) prohibits charges for water which could have been lawfully withdrawn in October, 1961, when the Compact was enacted.

More than ten years later, the Commission adopted Resolution 74-6 which implemented a system of rates for withdrawals. Resolution 74-6 exempted pre-1961 users up to the amount of their legal entitlement:

In compliance with this provision, there shall be no charge for water withdrawn or diverted in quantities not exceeding the legal entitlement of the user, determined as of October 27, 1961.

The Resolution proceeds to define "legal entitlement" as follows:

1. Legal entitlement means quantity of volume of water expressed in million gallons per month determined by the lesser of the following conditions:

(a) A valid and subsisting permit, issued under the authority of one of the signatory parties, if such permit was required as of October 27, 1961, or thereafter;

(b) Physical capability as required for such taking;

(c) The total allocable flow without augmentation by the Commission using a seven day, ten year, low-flow criterion mesh at the point of withdrawal or diversion.

In 1966 the City of Philadelphia and Bucks County Water and Sewer Authority entered into an agreement under which Philadelphia was to supply Bucks with thirty-five million gallons of water per day. Philadelphia's defined "legal entitlement" was such that the City could withdraw the additional water within the limit set by the Resolution. The Bucks Authority requested DRBC to review the contract but were informed by the Commission that the Agreement would not have to be reviewed as it had no "substantial effect on the resources of the Basin". (See Compact Section 3.8)

In 1976, the Commission insisted that Bucks County Water and Sewer Authority be charged for withdrawals made by Philadelphia and subsequently forwarded to Bucks. The Authority refused to make payment, claiming the withdrawal was made under Philadelphia's legal entitlement. DRBC brought suit in Federal Court alleging as its basis of jurisdiction the Act of June 25, 1948, C. 646, §1, 62 Stat. 928 (28 USC 1331).

The District Court granted DRBC's motion for Summary Judgment, and BCWSA appealed to the Court of Appeals for the Third Circuit, arguing that the exemption violates the Constitutional principles of equal protection. In a 1981 Opinion a panel of that Court expressed grave doubts as to the Constitutionality of Section 15.1(b) and Resolution 74-6, but remanded the case to District Court, directing the Commission and perspective intervenors to "proffer some purpose that the Court may reasonably presume to have motivated the Congress that added Section 15.1(b) to the Compact [so] there will be a standard against which to test the rationality of Resolution 74-6". *DRBC v. BCWSA*, 641 F. 2d 1087, 1113 (3rd Cir. 1981)

On remand, the Commonwealth of Pennsylvania, Bethlehem Steel Company, and the United States Steel Company intervened on behalf of DRBC and the City of Philadelphia.

Intervening on the side of BCWSA was Western Berks Water Authority.

On remand, DRBC, the City of Philadelphia, and several of the intervenors produced voluminous documentation of the proceedings which it was hoped would provide data as to why this section of the Compact was adopted by Congress. The documents included transcripts from state hearings on the Compact, press releases, and correspondence between the framers and interested parties. Many were interesting, however, the only writings regarding Congressional ratification are a statement in the Congressional Record that Section 15.1(b) will clarify Section 3.7 and correspondence from Secretary of the Interior Udall which left us with no idea as to the purpose for Section 15.1(b).

Nevertheless, the District Court again granted Summary Judgment against BCWSA and, on Appeal to the Third Circuit Court of Appeals, Judgment was affirmed.

As a result of the Third Circuit's Judgment Order dated January 6, 1983, Bucks County Water and Sewer Authority filed this Petition for Writ of Certiorari.

IX. ARGUMENT

A. CERTIORARI SHOULD BE GRANTED TO REVIEW THE CIRCUIT COURT'S JUDGMENT ORDER SINCE THE CONSTITUTIONALITY OF THE COMPACT AND REGULATIONS PROVIDING FOR INTERSTATE AND FEDERAL MANAGEMENT OF THE DELAWARE RIVER BASIN ARE SIGNIFICANT AND VITAL TO THE WATER RESOURCES OF THE REGION.

This is not the first case involving management of the Delaware River Basin which has come before this Court. You have historically recognized the importance of the River to the mid-Atlantic water supply, and have on several occasions, heard cases involving disputes over these waters. In 1931, *New Jersey vs. New York*, 283 U.S. 336, 51 S. Ct. 478, 75 L. Ed. 1104 (1931) involved a dispute about the water between those states. In *State of New Jersey vs. State of New York*, 347 U.S. 995, 74 S.C. 842, 98 L. Ed. 1127 (1954) this Court was again called on to decide a conflict over allocation of River Basin waters. There, the Court took special note of the important and unique qualities of problems involving allocation of Basin water. In the Decree, the Court specifically retained jurisdiction of this dispute which also involved Pennsylvania, Delaware, and New York City.

DRBC vs. BCWSA, is another case of particular Federal importance and significant public interest. Petitioner challenges, on equal protection grounds, a rate structure which permits the Commission's annual revenue of \$500,000 to be levied on twenty-four users while over two hundred users pay nothing. Of the paying users, only five consume more than one hundred million gallons of water per month. Comparatively, of the exempted users, over seventy-five consume more than one hundred million gallons per month.

A rate structure so unevenly applied is in no rational way related to the Compact, which lists, as a specific

purpose of the Compact, the Goal to treat similarly situated users equally. (Compact Section 1.3(e))

The rate structure affects hardest certain segments of the public, and is, therefore, of great public interest. Public utilities and municipal water authorities contributed 94% of the 1981 revenue of DRBC. Expenses of these entities are passed on directly to the individual users.

The situation shows no sign of change. In fact, DRBC Resolution 74-6 allows pre-1961 users to take Basin water in amounts much greater than they were taking when the Compact was enacted. Most pre-1961 users will never reach the limit of the "legal entitlement" as defined by Resolution 74-6, and accordingly will not contribute to expensive projects which improve the Basin for the benefit of all users.

The revenue collected by the user charges is being used to finance dams and reservoirs (Beltsville Dam and Blue Marsh Reservoir). Blue Marsh, for example, is of extreme importance to the water supply of Philadelphia. In times of shortage, water is released to prevent the salt line from rising, thereby avoiding an infiltration of salt into the Philadelphia water system. Philadelphia contributes nothing to this project, while others who do not benefit, pay dearly for it.

Unless this Court grants certiorari, Philadelphia, in all probability will never pay user charges. The City currently withdraws an estimated 11.7 billion gallons of water a month from the Basin, but has a "legal entitlement" to approximately 18.8 billion gallons per month.

This Court has, in cases of public and political importance, exercised its power to grant certiorari. *Magnum Import Co. vs. Coty*, 262 S. 159, 43 S. Ct. 531, 67 L. Ed. 922 (1923). *Lau Ow Bew vs. United States*, 144 U.S. 47, 12 S. Ct. 517, 36 L. Ed. 340 (1892). *Merrill Lynch, Pierce, Fenner & Smith, Inc. vs. Ware*, 414 U.S. 117, 94 S. Ct. 383, 38 L. Ed. 2d 348 (1973). The issue of the management of the Delaware River Basin is of the utmost

importance to the many Basin users, and a final decision by the Supreme Court is necessary.

B. CERTIORARI SHOULD BE GRANTED TO REVIEW THE CIRCUIT COURT'S JUDGMENT ORDER UPHOLDING THE CONSTITUTIONALITY OF THE PRESENT RATE STRUCTURE BECAUSE THE RESULTING CLASSIFICATION LACKS A RATIONAL BASIS, THEREBY CONFLICTING WITH APPLICABLE DECISIONS OF THIS COURT.

1. Introduction

Petitioner Challenges Section 15.1(b) of the Delaware River Basin Compact and Resolution 74-6 as establishing a rate structure which violates Equal Protection guarantees of the Fifth and Fourteenth Amendments of the United States Constitution. The Third Circuit Court of Appeals, in their 1981 decision, examined the legislation to determine if the rate structure bore a rational relation to a legitimate purpose of the Compact. The Circuit court found no legitimate purpose for the exemption of pre-1961 users, but remanded the case to District Court in order to provide DRBC with an opportunity to offer an explanation for the exemption consistent with the purposes of the Compact.

The District and Circuit Courts upheld the constitutionality of a classification between pre and post 1961 users. Petitioner contends there is no rational basis for the classification. The lower courts' rulings are contra to previous decisions of this Court which have held that economic classifications must bear a rational relation to a legitimate purpose. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 101 S. Ct. 453, 66 L. Ed. 2d 268 (1980). *McGinnis v. Royster*, 410 U.S. 263, 93 S. Ct. 1055, 35 L. Ed. 2d 282 (1973). In *Mathews vs. Lucas*, 427 U.S. 495 at 510, 96 S. Ct. 2760 at 2764, 49 L. Ed. 2d 651 at 658, (1976), this Court warned that the rationality standard is not "toothless". The lower courts'

misapplication of the rational basis standard has resulted in a hardship to the many citizens who must pay higher water rates because they are served by municipal authorities which did not withdraw water until after 1961.

In applying the rational relation standard, we find the purpose of the Delaware River Basin Compact is no mystery. Compact Section 1.3 sets forth articulated purposes. These include long term and emergency planning for maintenance, conservation and allocation of Basin resources.

The purpose of the user charges is equally clear. In *Borough of Morrisville v. Delaware River Basin Commission*, 399 F. Supp 469 (1975), the Third Circuit quoting from a *Notice to Interested Parties, Water Supply Price Hearing Issues, Part II, P. 4-7* explained the "pooled water" theory. The Basin should be viewed as a single pool of water, the enlargement of which benefits all. As the DRBC Notice specifically stated.

All users benefit from a regulated pool of water. In this case, the pool is defined as the Delaware River Basin System. As water seeks its level over its entire surface, benefits tend to diffuse to users of water resources throughout the entire pool service area. So long as a reservoir, regardless of its location, contributes to the entire pool, at a justified cost, and so long as users are dependent upon the pool for their supply, benefits accrue to users at least to the extent of their alternative cost of providing the service they enjoy from the pool.

The exemption of pre-1961 users does not rationally advance this purpose, but is directly contra to it. The inquiry should properly end here. The reviewing Court is fortunate to have a stated purposes for the Compact and the user charges. Applying the proper standard, it is clear no legitimate purpose is furthered by the exemption.

However, on remand, the District Court suggested several purposes which are advanced by the exemption. The purposes are not documented in the legislative history. Petitioner addresses these purposes below, contending still that when a legislature has articulated purposes for enacting a statutory scheme, fabrication of purposes is inappropriate.

2. *Political support as a legitimate purposes.*

Of the purposes attributed to the framers of the District Court, the record shows only one to have even the slightest basis in fact. The Lower Court Opinion refers to the engendering of cooperation of existing users. Pre-1961 users admit the difficulty of gaining sufficient support from both the public and private sectors to form the Compact in 1961. The framers held numerous hearings in Pennsylvania at which major industrial users specifically Bethlehem and U.S. Steel, often appeared to state opposition to withdrawal charges.

On certiorari, this Court will be presented with the important issue of whether gaining political support for passage of a piece of legislation is a legitimate purpose for the adoption of an invidious classification.

The political support issue has been before this Court previously. *Baldwin v. Fish and Game Commission of Montana*, 435 U.S. 371, 98 S. Ct. 1852, 56 L. Ed. 354 (1978), involved a non-resident's right to hunt big game in Montana. This Court, in upholding the classification as an effort to protect the wildlife of the state, noted "that the need or desire to engender political support cannot by itself justify an otherwise invidious classification." *Baldwin*, footnote 24, citing *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 266, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974).

In the present case, the purpose of engendering political support is the only one which we can reasonably impute to the legislature for unilateral inclusion of the exemption. Legislative schemes made for the purpose of

gaining political support cannot withstand an equal protection challenge. If they could, any classification, no matter how invalid on other grounds, could be sustained by a determination that the discrimination is necessary to gain political support for passage.

Perhaps the most important function of this Court is to prevent exploitation of the politically weak by the politically powerful. Without Supreme Court clarification of this issue, judicial review of economic and social legislation would become a farce.

3. *Other purposes proposed by District Court were illegitimate.*

The District Court speculated to another purpose for the classification with a statement that the section in controversy may have been enacted to limit the ratemaking authority of the DRBC.

The argument begs the question. As Justices Brennan, Marshall and Stevens agreed in *Fritz*, the rational basis test requires more than "a mere tautological recognition of the fact that Congress did what it intended to do." *Fritz*, 449 U.S. at 180, 101 S. Ct. at 462, (1980).

The "power-limiting" argument cannot survive an examination of whether Congress and DCBC "achieved its purpose in an patently arbitrary or irrational way." *Fritz*, 449 U.S. at 176, 101 S. Ct. at 460, (1980). There is nothing rational about a limitation of power which operates to levy on only 10% of users water charges for projects that benefit two hundred and sixty-four of the Basin's users.

Another thought proffered by the District Court is a reliance interest by pre-Compact users on a supply of free water. This purpose is not legitimate. Reliance is not the purpose, but the benefit of an illegal classification. Reliance on the benefits of a classification could be argued as the purpose of every piece of legislation reviewed under this equal protection standard. It is impossible to conceive of a classification wherein it could not

be said that the benefitted class had relied on the classification. This is the end result of, and not a legitimate purpose for, an illegal classification. In holding otherwise, the Courts below failed to properly apply the rational relation standard, thereby departing from prior decisions of this Court. For these and other reasons, Petitioner requests certiorari be granted.

This Court has on many occasions held that a reliance interest in the benefit of economic legislation (or the lack thereof) is not justified. *Fritz, New Orleans v. Duke*, 427 U.S. 297, 96 S. Ct. 2513, 49 L Ed 511 (1976), *Duke* involved Plaintiffs who had been financially injured by a change in the legislative scheme.

Duke is somewhat similar to the case at bar in that a grandfather clause is supposed to be involved in each case. New Orleans street vendors who had been in business less than eight years were prohibited from continuing their trade by city ordinance. The ordinance was challenged on the basis that the classification was arbitrary. This Court held grandfather clauses permissible in an attempt to remedy a problem on a step by step basis.

The classification here is not a step by step approach, and probably not a standard *Grandfather Clause*, but a permanent exemption of pre-1961 users. While the District Court found that the classification here not permanent, such a holding is fatuous. Pre-1961 users, in virtually all instances are not individuals as Mr. *Duke*, but political subdivisions and corporate entities. Never, barring global disaster, will the Commonwealth of Pennsylvania or the City of Philadelphia cease to exist, nor most of the corporate users or major utilities.

The Resolution 74-6 definition of legal entitlement insures that the exempted users will never pay a withdrawal charges if they expand at the expected rates.

Without laboring on statistical detail, suffice it to say that in the more than twenty years since the formation of the Compact, less than 5% (13 users) of the two hundred thirty nine existing uses have surpassed their legal entitlement.